

Proposed Process for Screening Future State of Florida's  
State 404 program permit applications to EPA for review  
DRAFT 03.21.2020/mjd

As part of the State of Florida's request to assume the responsibility for permitting activities under section 404 of the Clean Water Act (CWA) 33 U.S.C. 1251, coordination processes are being developed between the Florida Department of Environmental Protection (FDEP) and the Environmental Protection Agency (EPA) for the review of future State 404 program permit applications. Under 40 CFR §233.51 (b)(2), applications that are not waived for review by EPA include those that may involve "discharges with reasonable potential for affecting endangered or threatened species as determined by FWS [U.S. Fish and Wildlife Service]".

To ensure that EPA will have the opportunity to review and provide comment on all of the applications that fulfill §233.51(b)(2), FDEP is proposing to define terms and provide a process for using the phrase "reasonable potential for affecting endangered or threatened species" that will be specific to the Florida State 404 permitting program. The intent is to include the definition of terms and processes into the State's Biological Assessment (BA). Agreement between EPA and FDEP on the types of applications that will be sent to EPA during the State 404 process will ensure consistency and clarity for FDEP staff responsible for forwarding these applications to EPA for review. See Table 1 below for guidance on similar State and Federal terms used in this document.

Activities regulated under the CWA, and activities that will be regulated under the potential State of Florida Chapter 62-331 F.A.C for the State 404 program, may adversely impact listed species and their critical habitats. Because the language in 40 CFR §233.51 (b)(2) refers to "endangered or threatened species as determined by FWS", it is reasonable to consider requirements under the CWA as dependent on term usage within the Endangered Species Act (ESA), which is the guiding authority for FWS. For the purposes of determining which applications to forward to EPA for review, FDEP proposes to identify such applications that "may adversely impact" listed species and their critical habitats. We believe that due to potentially increased workloads, it is unlikely that EPA would want to review an application that may have a beneficial impact to listed species.

*The 2001 Enhanced Coordination Memorandum of Agreement (MOA)*

In 2001, a MOA was signed between the EPA, FWS and the National Marine Fisheries Service (NMFS) regarding enhanced coordination under the CWA and ESA. This MOA addresses interagency coordination, including those for the National Pollutant Discharge Elimination System (NPDES) permitting programs (sections 303(c), 304(a) and 402 of the CWA). Under section 303(c), the development of water quality standards is primarily the responsibility of States and tribes, with EPA exercising an oversight role. The MOA establishes a framework for coordinating these actions, including discussions on "adverse effects."

As discussed in the MOA, using the terminology "adverse effects" was problematic because it is an ESA term under section 7, and would be confusing if used during EPA coordination procedures to ensure protection of listed species with regard to State/Tribal permits. To avoid confusion, the MOA uses the words "more than minor detrimental effects" in place of "adverse effects." For the purposes of the State 404 permit program, "adverse impacts" will be used in lieu of "adverse effects".

The MOA further explains that under the NPDES program, detrimental effects that are more than minor include circumstances where 1) there is a failure to ensure the protection and propagation of fish, shellfish and wildlife; 2) the State or Tribe and the Services are unable to resolve the issues; and 3) issuance of a permit is likely to jeopardize the continued existence of any listed species, or result in the destruction or adverse modification of critical habitat. The CWA terms "reasonable potential to affect" and "more than minor detrimental effects", as well as the language in the MOA of "failure to ensure the protection and propagation" could be interpreted as similar to:

1) the Services' determinations under the ESA where take is reasonably certain to occur, and/or the likelihood of jeopardy or the destruction or adverse modification of critical habitat, and

2) the State 404 program's determination of "likely to adversely impact" and/or the likelihood of jeopardy or destruction or adverse modification of critical habitat.

It is for these reasons that FDEP suggests the standards for determining which permit applications should be sent to EPA for review should be similar to the three circumstances discussed above. It is important to clarify the intent of the term "potential" in this context. Regardless of whether take is likely in the near future, the determinations noted above also include the potential for jeopardy as a result of future loss of critical habitat "as a whole." Effects of an action include all consequences to listed species or critical habitat that are caused by the proposed action. A consequence is "caused by the proposed action if it would not occur 'but for' the proposed action and it is reasonably certain to occur."

Based on the number of permits reviewed by the Corps of Engineers for the last six years (between 2014 and 2019), approximately 6% (186 applications out of 2,977) represented projects where adverse impacts/effects were likely to occur, or jeopardy/adverse modification of critical habitat was likely to occur. The calculation for this number does not include the applications reviewed where all activities were resolved by programmatic consultation (approximately 2,216). While EPA retains audit authority, should they decide additional reviews would be valuable, we recommend that random applications at some frequency be sent for quality assurance review. These random applications could be those which have been identified as "may impact" but have not yet been identified by the State as "may adversely impact". This would allow for oversight of determining the projects which have a "reasonable potential to have more than a minor detrimental effect."

Also, if considered valuable to EPA, FDEP suggests that a State 404 implementation team could be organized to monitor the types of permit applications that are sent to EPA. This team could consist of staff from EPA, FWS and FDEP, and could evaluate whether the projects that were sent to EPA for review during the first year of implementation were appropriate, or if there were outliers or specific categories of projects that should be reviewed by EPA for endangered species concerns.

### *Conclusion*

In conclusion, FDEP suggests that the phrases "with reasonable potential for affecting endangered or threatened species" and "more than a minor detrimental effect" be interpreted under the State 404 program as those applications where, after avoidance and minimization efforts, any one of the following is applicable: 1) there is a failure to ensure the protection and propagation of fish, shellfish and wildlife; 2) the State of Florida and the Services are unable to resolve the issues; and 3) issuance of a permit is likely to jeopardize the continued existence of

any listed species, or result in the destruction or adverse modification of critical habitat.

Table [ SEQ Table \\* ARABIC ]: State and Federal Terminology Guide

State 404 term	ESA term	CWA term	Definition
Adverse impact	Adverse effect	Reasonable potential to affect	Deleterious or adverse consequence
No impact	No effect	No potential to affect	Species or habitat is not present in the action area or not expected to be impacted
Not likely to adversely impact	Not likely to adversely effect	A minor detrimental effect	Take is not reasonably certain to occur; or expected impacts are insignificant or discountable
Likely to adversely impact	Likely to adversely effect	More than a minor detrimental effect	Take is reasonably certain to occur
Jeopardize/jeopardy	Jeopardize/jeopardy	Jeopardize/jeopardy	To engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.
Control measure	Conservation measure	Control measure (?)	Control measures are project design or specification changes and/or operational restrictions intended to avoid or minimize adverse impacts to listed species and their habitat
Species coordination	Consultation	Consultation (?)	Used in the context of assumption between federal agencies and FDEP when coordinating impacts to listed species (similar to the term "section 7 consultation" in ESA)